No. 777.

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IN THE

Supreme Court of the United States

October Term, 1940

PEOPLE OF THE STATE OF ILLINOIS EX REL. GARFIELD F. LEAF, COUNTY TREASURER, EX OFFICIO COUNTY COLLECTOR, LAKE COUNTY, ILLINOIS,

Petitioner,

vs.

E. R. ORVIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION.

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BRIEF IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion below of the Supreme Court of Illinois, is reported at 374 Ill. 536 (30 N. E. [2d] 28) and printed in the petition. The same court's opinion in the earlier *Orvis*

case is reported at 358 Ill. 408 (193 N. E. 199). Copy of that opinion is printed as an appendix hereto.

Jurisdiction.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code (28 U. S. C. A. 344 [b]). In this branch of the petition petitioner says (p. 4, paragraph 2):

> "The judgment referred to of the Federal District Court of the Northern District of Illinois in the case of *Ohio National Insurance Company* v. *Grant Community High School District No. 124, Lake County, Illinois*, rendered June 30, 1936, which held the bonds in question as valid, is a right set up by petitioner", etc.

This judgment of the Federal District Court, appearing in "Appendix D" on page 28 of the petition was rendered June 30, 1936, and recites (Tr. 30):

> "This day again came the parties to this suit by their attorneys respectively and the Court now hereafter hearing all the evidence adduced finds the issues for the plaintiff and assesses the plaintiff's damages at the sum of Three Thousand Twenty-five Dollars ($3,025.00) together with its costs and charges in this behalf expended therefore it is considered and
>
> Ordered by the Court that the plaintiff do have and recover of and from the defendant the sum of Three Thousand Twenty-five Dollars ($3,025.00) together with its costs and charges in this behalf expended and have execution therefor.
>
> It is ordered that leave be and the same is hereby given the plaintiff to withdraw coupons upon leaving photostatic copies in lieu thereof."

No finding was made that bonds were valid. None of the bonds were apparently introduced in evidence, but coupons

were and leave was given plaintiff to withdraw them. Moreover, the parties were not the same.

Under this heading petitioner also says (in paragraph 5 on page 5):

> "The failure of the Supreme Court of Illinois to give full faith and credit to said District Court judgment, using language as follows:
>
> > 'This Court cannot recognize the claim of appellees that the decision of the Federal Court is controlling here,'
>
> is in violation of Revised Statutes 905, 28 U. S. C. A. 687 which requires that judgments of the Federal Courts in a state shall have the same dignity in the courts of that state as those of its own courts."

Not stated is the fact that in the former *Orvis* case the Supreme Court of Illinois had declared and held that the claims upon which this bond issue was founded were *illegal* and *void*, and that the bonds were also void; that full faith and credit need not be given a Federal Court judgment which is not *res adjudicata* because the parties are different; and the following announcement that the Supreme Court of Illinois had made:

> "In *Chicago and Eastern Illinois Ry. Co.* v. *People*, 219 Ill. 408, it had been held that when the Supreme Court had held a particular tax levy invalid the legislature was without power to afterward validate the levy and make the tax collectible."

Also overlooked is the fact that the former *Orvis* case is *res adjudicata* of the instant case. The court below said in this connection:

> "That the claims and these bonds issued thereon are invalid is *res adjudicata.*" (Copied from opinion of Supreme Court of Illinois as it appears on page 26 of Appendix B.)

This is because "when this cause was presented to the Federal District Court the law of this State was that these bonds are illegal." This is why the court below properly said:

> "Owing to this fact and the limitations of the Federal Judiciary Act, this Court cannot recognize the claim of appellees that the decision of the Federal Court is controlling here.
>
> "It is said that the bondholders who were not parties to that suit are not estopped to urge their claims here. However, that may be the adjudication of this Court that these bonds were invalid is *res adjudicata* as to that question." (Petitioner's Appendix "B," paragraphs 1, 2 and 3 on page 26.)

This holding was plainly right under the rule of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Questions Presented.

The real question presented is:

May the Federal District Court, in proceedings conducted in haste suggesting the absence of real adversary proceedings or active defense, in which the answer admits or expressly refrains from denying substantially all the allegations of the complaint, and to which no taxpayer was a party, notwithstanding the opinion rendered in prior proceedings in the Illinois Supreme Court in which that court declared of the claims in question that they "were illegal and void and the bonds issued were also void," and notwithstanding the settled law of Illinois that the legislature is without power to validate, retroactively, a void levy, nevertheless render a judgment against a taxing district, in a matter of purely state concern governed by State law, which will be *res adjudicata* as against objecting taxpayers of such

district and as such entitled to full faith and credit, even though directly contrary to the law of Illinois?

Statement.

Petitioner's statement (on pages 2 to 6) should be supplemented by calling attention to the following from the opinion below (printed as Appendix "B" of the Petition):

> "The first section of said Act (the first allegedly validating act[1]) provides that where, prior to March, 1931, any school district has provided for the issue of bonds for any purpose now authorized by law, and such bonds, including existing indebtedness, exceed two and one-half per cent of the value of taxable property therein, then any such bonds may be executed and delivered to a purchaser notwithstanding such excess." (Page 20 of Petitioner's Appendix "B.")

The Court below said further:

> "In this prior *Orvis* case it was pointed out that the claims to pay which the bonds were issued, raised the indebtedness of the district beyond the two and one-half per cent limit prescribed by statute, and therefore the claims were *illegal.*" (Italics ours; page 20 of Petitioner's Appendix "B.")

The opinion below further recites:

> "Inasmuch as the claims paid were illegal, the Validating Act of 1933[2] had no application to bonds issued for the payment of such claims. After the adjudication of this Court in the prior *Orvis* case another so-called validating act was passed in 1935 (Ill. Rev. Stat. 1937, Chap. 122, par. 406y)[3] evidently intended to cover this situation. Appellant urges that it is void." (Page 21 of Petitioner's Appendix "B.")

---

[1] The act of April 30, 1931, set out as Appendix B, below.

[2] The second allegedly validating act, set out as Appendix C hereto.

[3] The act here material. It is set out as Appendix D hereto.

Also the following:

> "It is also pointed out that since the decision in th*Orvis* case no tax has been levied to collect eithe principal or interest of the bonds until the year 193 when the clerk extended the tax which he had n right to do." (Page 18 of Appendix "B.")

The general statute in effect at the time (Cahill's Stat 1933, ch. 120, par. 362[2]) limited such bonds to two an one-half per cent of the value of taxable property in th district, except after an election as provided by the act.[1]

[1] This section providing for this limit is set out as Ap pendix A hereto.

ARGUMENT.

Petitioner refers (on page 12) to the complaint filed in the Federal District Court. Paragraph 3 of the complaint (Tr. 27) alleges:

> "That after said bonds had been duly issued and sold as aforesaid, certain questions arose in a tax objection suit to which the holders of said bonds were not parties concerning the validity of said bonds due to alleged irregularities in the proceedings had in connection with the issuance thereof; that thereafter a certain validating act was passed by the General Assembly of the State of Illinois, and approved on June 6, 1935, which provides as follows:" (then follows the Act of 1935.)
>
> "That by reason of said Validating Act all proceedings had in connection with the issuing of said bonds are expressly validated, and said bonds and the interest coupons thereto are valid and binding obligation of the defendant."

The answer admits the allegations of the complaint that plaintiff is the owner of bonds, the amount due, and that demand was made for payment of interest coupons, and denies that plaintiff is entitled to the relief prayed and prays to be dismissed. It is signed, "Charles Jacks, Attorney for Defendant." The certificate of the District Court Clerk shows that the complaint was filed "April 17-1935" and that judgment was entered "June 30-1936" (Tr. 30). The judgment of the District Court appears in full in the record herein (Tr. 30) and has been set out above (*supra*, p. 2). There is not a word in it affirmatively holding the coupons or bonds to be valid or binding.

The absence of any real denial in the defendant's pleading in the Federal Court suit and the unusual haste with

which this important litigation was thus disposed of at least suggest the absence of real adversary proceedings, and warrant the inference that the first *Orvis* case, 358 Ill. 408, 193 N. E. 199, was not very strongly pressed upon the presiding Judge of the District Court (Judge Wilkerson). One may surmise that if the former *Orvis* case and applicable Illinois decisions had been really pressed upon the Federal District Court, that Court would probably not have entered the judgment for the Ohio National Insurance Company against the Board of Education. Testimony herein was, however, given that this *Orvis* case was presented to the District Court (Tr. 32):

> "Charles E. Jack, witness (for appellee in State Court), was sworn and testified: That he appeared as attorney for Grant Community High School District No. 124 in the Federal Court, No. 45263; was present at the time arguments were had in connection with the entry of the decree in that case; the decision in the *Orvis* case reported in 358 Ill. 408, was read to Judge Wilkerson and discussed by Mr. Cassidy at the time of the hearing."

Charles E. Jack was the attorney for the Board of Education. One may justifiably assume that he was not very vigilant in protecting the District *taxpayers,* who had no representation and *were not parties to the action.* The Supreme Court of Illinois had declared that the claims upon which the bond issue was founded were "*illegal*" and "*invalid*" and the bond issue void.

It does not appear that the attention of the Federal Court was called to the earlier case of *Chicago and Eastern Illinois R. R. Co.* v. *People,* 219 Ill. 408-411, 76 N. E. 571, in which the court said:

> "The judgment rendered by this Court when this cause was first heard was a final adjudication that

> the tax in question was *invalid*. The legislature *could not thereafter validate this levy* and thereby make the tax collectible. Cooley's Const. Lim. (7th Ed.) 136-139; *Dobbins* v. *First National Bank*, 112 Ill. 553." (Italics ours.)

This was the law of the State of Illinois at the time of hearing in the Federal Court case. In the opinion below of the Supreme Court of Illinois in the instant case the law was stated in a few short words:

> "Conversely, the General Assembly cannot by a curative act make a void proceeding valid."

This statement is followed by the citation of six Illinois decisions, which are to the same effect:

People v. *Southern Railway Co.*, 367 Ill. 389, 11 N. E. (2d) 602;
People v. *Chicago and North Eastern Ry.*, 365 Ill. 202, 6 N. E. (2d) 119;
People v. *Padley*, 340 Ill. 314, 172 N. E. 763;
People v. *Chicago, Mil. & St. Paul Ry. Co.*, 321 Ill. 499, 152 N. E. 560;
Maulding v. *Skillet Fork Drainage Dist.*, 313 Ill. 216, 145 N. E. 227;
Roberts v. *Eyman*, 304 Ill. 413, 136 N. E. 736.

The Illinois rule was also said in *People* v. *Sandberg Co.*, 282 Ill. 245 (at page 258), 118 N. E. 469, that

> "when the Supreme Court held a particular tax levy invalid the legislature was without power to afterward validate the levy and make the tax collectible."

The law thus announced by the Illinois Supreme Court was binding on the Federal Courts. *Erie R. R.* v. *Tompkins*, 304 U. S. 64, *supra*, 58 S. Ct. 817, 82 L. Ed. 1188.

In the complaint filed in the Federal District Court case, in paragraph 2, it is alleged (Tr. 27):

> "That said bonds were issued pursuant to proceedings duly had for that purpose and said bonds were issued for the purpose of paying certain claims for services rendered and materials furnished to the District, for the construction, equipment and maintenance of schools in said District; that simultaneously with the issuance of said bonds, said claims in a like amount were paid and cancelled."

In paragraph 3, it is alleged:

> "That after said bonds had been duly issued and sold as aforesaid, certain questions arose in a tax objection suit to which the holders of said bonds were not parties, concerning the validity of the said bonds due to irregularities in the proceedings had in connection with the issuance thereof; that thereafter a certain validating act was passed by the General Assembly of the State of Illinois and approved on June 6, 1935, which provides as follows:"

Then follows the reference to the validating act that the Supreme Court of Illinois has declared below in the instant case (see page 26 under Appendix "B" of petition) to be invalid. The conclusion intended to be drawn from the facts thus alleged is in direct conflict with the settled law of Illinois as laid down in the above and many other decisions of the court of last resort of that state.

The record herein fails to show any notice to the taxpayers or any notice to their counsel of this proceeding in the Federal District Court until December 31, 1936, six months after the judgment of the Federal District Court, in this singularly and suspiciously expeditious litigation, was entered on June 30, 1936. Finally, under date of December 31, 1936, a letter was written by the district's at-

torney, B. F. Langworthy, to D. T. Smiley, counsel for the respondent, in which the writer said (Tr. 31):

> "The complaint (in the Federal Court suit) set up the validating act passed by the Legislature in 1939 and approved June 6, 1935, which is found in the laws of 1935, page 1335. The Court held that the validating act was legal following the decision of the United States District Court."

The writer of the letter also said in it (Tr. 32):

> "I believe this last validating act is legal and constitutional, and I also believe that the judgment of the Federal Court is *res adjudicata.*"

The complaint obviously sought to minimize the distinction between the importance of the defects by calling them "irregularities," when in fact the bonds were "*void.*" It is a familiar principle of Illinois law that "irregularities" in tax levy proceedings which are voidable only can be validated by the General Assembly. Likewise, as the above authorities have settled in Illinois, where proceedings are *void* the General Assembly cannot make them valid by a curative act. In the prior *Orvis* case, 358 Ill. 408, 193 Ill. 199, the Supreme Court of Illinois had determined that the claims were *illegal* and *void* and that the bonds issued to pay such claims were also *void.* Perhaps if the taxpayers had had timely notice of the pendency of these proceedings one or more of them might have intervened and pressed upon the District Judge the Illinois decisions, binding on him under the rule of *Erie R. R.* v. *Tompkins,* and obtained a different result. They had no opportunity to do so. This is a particularly good case for the application of the salutary rule limiting the doctrine of *res adjudicata* to contested litigation between the same parties in interest.

Petitioner (on page 13) quotes and italicizes the following from this Court's opinion in *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104:

> "*Under it the judgments and decrees of the Federal Courts in a State are declared to have some dignity in the Courts of that State as those of its own courts in a like case and under similar circumstances.*" (Italics supplied by petitioner.)

This case arose out of a Section 77B reorganization proceeding, under the Federal Bankruptcy Act. Not alone does it not support petitioner's contention; but the opinion considered in the light of its facts makes it plain that the case below herein was correctly decided. In the *Stoll* case a corporation had made application for a Section 77B reorganization. *Notice of the proceedings was sent to the creditors, including Gottlieb.* A proposed plan was filed which, among other things, provided for the discharge of certain bonds and the cancellation of a guaranty endorsed on them by Stoll. On notice to Stoll *and a hearing at which he did not appear* the plan was confirmed. The confirmation provided that all creditors should be bound. Gottlieb thereafter sued Stoll in the State Court on the guaranty. Later *he filed a petition in the reorganization proceedings* asking for an order vacating or modifying the orders confirming the plan, on the ground that the District Court did not have power to cancel the guaranty. This petition was denied. No appeal was taken. In the State Court Gottleib recovered a judgment against Stoll, which the latter claimed was in violation of the State Court's duty to accord full faith and credit to the Federal Court decree. This decree was held by this court to be binding on Gottlieb who was therefore not allowed by this court to recover on the State Court's judgment.

We have, in the *Stoll* case, actual notice *to the party sought to be bound* of the proposed plan, *who was himself a party to the record,* and in addition that party *actually litigated the matter on his own behalf,* and after being defeated in the District Court took no appeal. Conversely, does not this *Stoll* case compel a contrary conclusion when the party claimed to be bound, under the doctrine of *res adjudicata,* by a Federal Court judgment *is not a party to the record,* especially as the nominal parties to the record had together an obvious interest adverse to the party thus sought to be bound, the taxpayer?

It is fundamental that the full faith and credit clause does not call for the application of the doctrine of *res adjudicata* against one not a party to the record. More closely analogous to the facts of the present case is *Engelhard* v. *Schroeder,* 278 Fed. 341, affirmed *per curiam,* 258 U. S. 610, 42 S. Ct. 382, 66 L. Ed. 789, where a receiver appointed in a New York proceeding, in which a certain assignment was held void, but in which the assignee was not a party, sued the assignee in New Jersey and was defeated. Thereafter he sued again in the Federal Court. The Circuit Court of Appeals used language suggestive of what was here attempted, both in the Federal Court suit and by the present petition:

> "We are further justified in the conclusion that the filing of the bill in this court was not an effort to right a wrong irremediable in the courts of New Jersey, but rather the attempt of an unsuccessful suitor in one court to possibly obtain a more favorable result in another."

The Federal court proceeding herein represents the attempt of an unsuccessful litigant in the State Court (in the first *Orvis* case) to get a more favorable result in another forum, without even making the interested taxpayer a party.

In *People* v. *C. C. C. & St. L. Ry. Co.*, 300 Ill. 368, 133 N. E. 255, the Illinois Supreme Court, in a case in which, as here, a prior judgment on certain bonds was relied on but held invalid, the Court said:

> "It seems clear that the Village had no authority to issue the bonds upon which the judgment in this case was based, so that the cases cited by appellee are not in point on this question.
>
> "But it is said that this is nevertheless a judgment on these bonds, and that such judgment having been entered and not appealed from cannot be attacked collaterally in these proceedings, but that it stands as a judgment for Village bonds and is not required to be included within the statutory limitations governing the vote of taxation. Taxes, no matter what their nature, purpose or form, except for payment of bonded indebtedness, and interest thereon, are expressly brought within the statutory limitation. This limitation cannot be avoided by permitting obligations other than bond obligations against a city or village to take the form of judgments. To do so would open the door to an evasion of the statutory limit of taxation.
>
> "It being admitted that these bonds were a part of that portion of the improvement which was to be paid by general taxation, the judgment secured on such bonds must be included within the limitation placed upon the village to levy taxes for village purposes. The objection to the excess tax should therefore have been sustained.
>
> "*Where it is sought to levy a tax to pay a judgment over and above the statutory limitation of taxation on the ground that such judgment is one for bonded indebtedness, there is no presumption that such judgment was entered for valid subsisting bonds. If this were true, cities and villages might issue invalid bonds to the constitutional limit and then by consenting to judgment thereon be authorized to levy a tax in excess of the statutory limitation to pay such judgment.*

when they would have no authority whatever to levy any tax over said limit to pay the bonds themselves." (Italics ours.)

None of the citations in the last paragraph on page 13 of the petition herein apply to the instant case. For instance, *Harmon, et al.* v. *Auditor of Pub. Accounts*, 123 Ill. 122, 13 N. E. 161, was a bill filed in the Circuit Court of Ogle County by taxpayers of the town of Mount Morris to restrain the collector and county clerk from collecting any taxes to pay bonds that complainants averred were illegal. The Illinois Court said (on page 136):

"If a contract when made was *valid* under the constitution and the laws of a state as had been previously expounded by its judicial tribunals and as understood at that time, *no subsequent action by the legislature or judiciary can impair its obligation.*" (Italics ours.)

The converse is also the rule as well. Since the Supreme Court of Illinois in the prior *Orvis* case held that the claims *were invalid* and therefore that the bonds were *invalid*, no judgment on the bonds or action of the General Assembly could validate them. Nor could the Federal Court breathe life into them, *as against taxpayers not parties to proceedings in that court.*

In *People* v. *C. B. & Q. R. R.*, 247 Ill. 340, 93 N. E. 422, the Illinois Court stated the general rule on the subject of *res adjudicata* as follows:

"To bring a case within the rule that a former judgment is *res judicata* of the cause of action, it must appear that such former adjudication was a matter *contested* between the *parties*, and if the suit is devised for the purpose of having a certain judgment entered, it will not be binding upon the public or those who were not parties to the scheme."

Was the Federal District Court case contested between the parties to the present proceeding when the pleadings of the District Board of Education practically gave the case away and its attorney did not see fit to notify the taxpayers for six months after the Federal District Court judgment was entered in these hasty and apparently uncontested proceedings? Certainly the taxpayers could not contest the suit when they were not parties, had no knowledge of it, and were not even notified of the entry of judgment until six months thereafter.

In *Pear* v. *City of East St. Louis*, 273 Ill. 501, 113 N. E. 60, also cited by counsel for petitioner, the Court (at page 505) said:

> "*The power of the city to adopt the ordinance is not in question*, and no facts pleaded show the city or its inhabitants have suffered any wrong or injury other than the allegation that the ordinance was not legally adopted. If it was a *valid* ordinance its acceptance by the water company made a valid and binding contract between it and the city and imposed the duty upon the city of performing its part of the obligation." (Italics ours.)

We cannot see that this case bears out the argument of counsel (on page 13) for petitioner. None of the citations (on page 13) bear out the statement that

> "the respondent was bound by the decision of the District Court because he is a taxpayer of the Grant Community High School District No. 124, Lake County, Illinois."

In *People* v. *Wisconsin Central R. R. Co.*, 219 Ill. 94, 76 N. E. 80, the Illinois Court used language pertinent here:

> "But while curative acts may heal irregularities they cannot cure *the want of authority to act at all*

and the Legislature cannot, by retrospective legislation confirm what it could not originally have authorized.

"It is the right of a *taxpayer* to have an opportunity to be heard before a tax shall be finally adjudged against him, and *no tax can be valid* without an opportunity for such a hearing." (Italics ours.)

It must be borne in mind that the *taxpayers* represented by counsel for respondent have been fighting the Board of Education of Grant Community High School No. 124, Lake County, Illinois, all the way through in this matter. This is shown and indicated all through pleadings and record, as hereinbefore set forth. It is not surprising that these *taxpayers* were not notified of the Federal District Court case at the time of the commencement of the suit or of the time of hearing or the judgment until six months had passed from the date of judgment, June 30, 1936.

CONCLUSION.

This is not a case for the exercise of the power to review a decision of a State Supreme Court under *certiorari*. The decision below was plainly right and in strict accord with the local law, in a matter of strictly state cognizance. The only Federal question in the case arises because of the extraordinary proceedings brought by a creditor of the School District (who was not a bona fide purchaser without notice, for he was charged with notice of any defects inherent under the State law) in form against the district, which *having an interest as against its taxpayers to sustain the void levy*, interposed a weak defensive pleading admitting or not controverting substantially all of the factual allegations of the complaint and denying only the conclusion. The taxpayers were not parties. The State law was plain. The earlier State Supreme Court

decision was itself *res adjudicata* against the School District. There is no great public interest or important question involved. The issues are simple and have been determined below upon the basis of the fundamental rules relating to the subject of *res adjudicata*. No conflict of authority appears. There is no occasion for further review and the petition should therefore be denied.

Respectfully submitted,

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